RECEIVED
FEB 12 2009
SD DEPT. OF LABOR
DIV. LABOR & MGMT.

CIRCUIT COURT OF SOUTH DAKOTA
SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY COURTHOUSE
P.O. BOX 1238
PIERRE, SOUTH DAKOTA 57501-1238
(605) 773-3711
Fax: (605) 773-6492

LORI S. WILBUR
PRESIDING JUDGE
(605) 773-8228
Lori.Wilbur@ujs.state.sd.us

COURT REPORTER
LORI J. GRODE
605-773-8227
Lori.Grode@ujs.state.sd.us

December 29, 2008

Comet H. Haraldson
Justin G. Smith
Woods, Fuller, Shultz, & Smith P.C.
300 South Phillips Avenue, Suite 300
PO Box 5027
Sioux Falls, SD 57117-5027

Drew C. Johnson
Johnson Law Office
Courtyard Suites # 3
428 N. Highway 281
Aberdeen, SD 57401

Re: Hughes Co. Civ. 08-269, Rebecca S. Cantwell v. Clear Channel Radio and Gallagher Bassett Services, Inc.

Clear Channel Radio, Employer, and Gallagher Bassett Services, Inc., Insurer, appeal the decision of Department of Labor awarding temporary total disability benefits and permanent partial disability benefits resulting from Claimant's cystocele, rectocele, and uterine prolapse; Rebecca S. Cantwell, Claimant, appeals the Decision of the Department of Labor denying permanent partial disability benefits for Claimant's lower back condition and the denial of awarding costs to Claimant. The decision is affirmed in part, reversed in part.

FACTS

In 2003, Rebecca S. Cantwell, Claimant, was working for Clear Channel Radio, Employer, as an account executive. Claimant earned $1020.59 per week as of 8 May 2003. While working on 8 May 2003, Claimant, with the help of her boyfriend, was lifting an empty pool onto a flatbed trailer. The pool weighed ninety-

eight pounds. While she was lifting this pool, she claimed to feel sharp pains her back, shoulder, and pelvic areas.

The next morning, Claimant sought relief from Dr. Skjefte, a chiropractor, to help with her back pain. She also made an appointment with Dr. Jundt, her treating physician. Claimant reported that she sustained injuries from the lifting incident. The doctor diagnosed cystocele, rectocele, and back problems. The same day, Claimant properly filed a First Notice of Injury Report with her Employer, reporting the aforementioned injuries.

On referral from Dr. Jundt, Claimant saw Dr. Berry on 2 June 2003. Dr. Berry is a board-certified OB-GYN who has been practicing in Aberdeen, SD for the past twenty-two years and was Claimant's treating OB-GYN during her pregnancies in 1990 and 1992. Dr. Berry confirmed that Claimant was suffering from cystocele, rectocele, and as well as diagnosing her with uterine prolapse. Dr. Berry advised Claimant of numerous options for her treatment. Claimant chose to have a hysterectomy. Claimant made a full recovery from the surgery and has suffered no work restrictions or work limitations due to the surgery.

Although Claimant maintains that the major cause of her cystocele, rectocele, and uterine prolapse was the lifting incident that took place on 8 May 2003, Employer and Insurer argue that the aforementioned injuries were caused by various other factors. Employer and Insurer point to the fact that Claimant has had five children through natural vaginal birth. Additionally, Claimant was "very overweight" during the time preceding these injuries. Employer and Insurer contend that theses factors were the major cause of Claimant's cystocele, rectocele, and uterine prolapse. To support this claim, Employer and Insurer had Dr. Philip Marcus, who is board certified in obstetrics and gynecology and teaches in that area of medicine at the University of Minnesota School of Medicine, perform an evaluation of Claimant pursuant to SDCL 62-7-1. He opined that Claimant's gynecological injuries were not compensable because the events taking place on 8 May 2003 were not a major cause of the injuries and that Claimant's injuries have resulted in no impairment.

Claimant offered the opinions of Dr. Scott Berry and Dr. Jeff Luther, a certified independent medical examiner who is board certified in internal medicine and emergency medicine and has a certification in the evaluation of disability and impairment ratings through the American Academy of Disability Evaluating Physicians. Although Dr. Berry acknowledged that vaginal births can weaken the tissues involved, making one predisposed to uterine injuries, he opined that the lifting incident was a major contributing cause. Dr. Luther, on the other hand, focused his evaluation on impairment resulting from the hysterectomy. Dr. Luther testified that under the *AMA Guides to the Evaluation of Permanent Impairment* (*AMA Guides*), Claimant had a fifteen percent impairment rating. He admitted

that the *AMA Guides* did not specifically address Claimant's situation, but used his "clinical judgment" to make his determinations.[1]

Beyond Claimant's cystocele, rectocele, and uterine prolapse, Claimant alleges certain lower back pain resulted from the injury. Claimant relied on Dr. Anthony Skjefte, her treating chiropractor, and Dr. Thomas Ivey, a chiropractor certified in impairment ratings, to establish the lower back injury. Dr. Skjefte reported that his opinion of causation was primarily based on Claimant's subjective reports of pain, but stated that it was "similar" to the pain she reported prior to the incident. Dr. Ivey stated that there was a thirteen-percent whole person impairment, but gave testimony that conflicted on whether it related to her both pre-existing and current back conditions.

The Department of Labor, Administrative Law Judge Heather Covey presiding, held a hearing on 9 May 2007 regarding this matter, which included live testimony from Claimant, Mark Heintzman (Claimant's boyfriend), and Dr. Thomas Ivey. The rest of the medical evidence was presented via deposition and medical records. The Department held that Claimant had proven she was entitled to temporary total disability benefits for fifteen days, a total of $1,446. The Department also found that Claimant had suffered a permanent partial disability based upon a fifteen percent medical impairment due to her cystocele, rectocele, and uterine prolapse caused by the lifting incident, and was entitled to recovery for $22,557.20. The Department found that Claimant did not meet her standard of proof as to causation of her lower back injuries, and disallowed any compensation for these claims.

Employer and Insurer, as Appellants, raise three issues on appeal:

1. Whether Claimant's 8 May 2003 lifting incident was a major contributing cause of her cystocele, rectocele, and uterine prolapse under SDCL 62-1-(7)(b).

2. Whether Claimant has proven that she is entitled to Permanent Partial Disability benefits as a result of her cystocele, rectocele, and uterine prolapse.

3. Whether Claimant has proven that she is entitled to fifteen days of Temporary Total Disability benefits under SDCL 62-1-1(8) based on time missed at work after the removal and surgical repair on her uterus.

---

[1] Dr. Luther also indicated that he believed the major contributing cause of the gynecological problems was the lifting incident on 8 May 2003. By his own repeated admission, Dr. Luther is not qualified to give an opinion as to causation. As a result, the Department found that his opinion holds no weight. This Court agrees.

Claimant, as Appellee, has raised the following issues:

1. Whether Claimant is entitled to a thirty-percent impairment rating for her cystocele, rectocele, and uterine prolapse based on the deposition of Dr. Marcus.

2. Whether Claimant has proven that her 8 May 2003 lifting incident was a major contributing cause of her need for treatment to her back under SDCL 62-1-1(7)(b).

3. If Claimant has proven that her 8 May 2003 lifting incident was a major contributing cause of her need for treatment to her back, then whether she is entitled to Permanent Partial Disability benefits for her back pains under SDCL 62-4-6(21).

4. Whether Claimant is entitled to receive her costs in connection with the DOL hearing and this Appeal.

STANDARD OF REVIEW

The standard of review in a workers' compensation case is established by SDCL 1-26-36. Witness credibility is a question of fact. Kuhle v. Lecy Chiropractic, 2006 SD 16, ¶ 15, 711 N.W.2d 244, 247 (citing Enger v. FMC, 1997 SD 70, ¶ 10, 565 N.W.2d 79, 83. When an issue is a question of fact, then the clearly erroneous standard applies to the agency's findings. *Id.*

Except for the testimony of Dr. Ivey, all the medical testimony in this matter was provided by deposition. When an agency makes factual determinations on the basis of documentary evidence, such as depositions, the matter is reviewed de novo. Vollmer v. Wal-Mart Store, Inc., 2007 SD 25, ¶ 12, 729 N.W.2d 377, 382 (citing Watertown Coop. Elevator Ass'n v. S.D. Dept. of Revenue, 2001 SD 56, ¶ 10, 627 N.W.2d 167, 171 (citations omitted). Accordingly, this Court will consider anew the medical evidence on causation on all topics outside of Claimant's back injury, the area in which Dr. Ivey testified.

ANALYSIS

I. CLAIMANT DID NOT MEET HER BURDEN OF PROOF THAT THE 8 MAY 2003 LIFTING INCIDENT WAS A MAJOR CONTRIBUTING CAUSE OF HER CYSTOCELE, RECTOCELE, AND UTERINE PROLAPSE UNDER SDCL 62-1-1(7)(B).

SDCL 62-1-1(7) provides, in pertinent part, that:

> An injury is compensable only if it is established by medical evidence, subject to the following conditions:
>
> (b) If the injury combines with a preexisting disease or condition to cause or prolong disability, impairment, or need for treatment, the condition complained of is compensable if the employment or employment related injury is and remains a major contributing cause of the disability, impairment, or need for treatment[.]

A claimant has the burden of proving all elements necessary to qualify for compensation. Sauer v. Tiffany Laundry & Dry Cleaners, 2001 SD 24, ¶ 9, 622 N.W.2d 741, 743 (citations omitted). Nonetheless, "[a] claimant does not need 'to prove that the work injury was 'the' major contributing cause, only that it was 'a' major contributing cause, pursuant to SDCL 62-1-1(7).' *Id.* at ¶ (citing *Brown*, 2002 SD 92, ¶ 23, 650 N.W.2d at 271). "A pre-existing medical condition or infirmity does not disqualify a claim . . . if the employment aggravated, accelerated, or combined with the condition or infirmity to produce the disability for which compensation is sought." St. Luke's Midland Regional Medical Center v. Kennedy, 2002 SD 137, ¶ 13, 653 N.W.2d 880, 884-85 (citations omitted).

In the case at hand, both parties offer the testimony of professionals for their position. "The testimony of professionals is crucial in establishing this causal relationship because the field is one in which laymen ordinarily are unqualified to express an opinion." Day v. John Morrell & Co., 490 N.W.2d 720, 724 (S.D. 1992). Claimant offers the opinion of Dr. Scott Berry. Dr. Berry graduated from the University of South Dakota School of Medicine in the top 10% of his class, followed by an internship and residency in OB/GYN at Indiana University for four years. Since then, he has been practicing medicine in Aberdeen, South Dakota exclusively in OB/GYN. Employer and Insurer offer the opinion of Dr. Phillip Marcus, M.D. Dr. Marcus went to the University of Southern California School of Medicine, followed by a residency at the LA County USC Medical Center, specializing in OB/GYN. Dr. Marcus is also an Associate Professor in the area of OB/GYN at the University of Minnesota School of Medicine and focuses his practice on OB/GYN work. As such, both experts are eminently qualified to give their opinion.

Although both doctors have different conclusions, for the most part, both agree on the underlying causes of cystocele, rectocele, and uterine prolapse. First, both agree that a number of factors can weaken the tissues involved, making one predisposed to cystocele, rectocele, and uterine prolapse. Additionally, both agree that Claimant likely suffered from numerous predisposing conditions to having cystocele, rectocele, and uterine prolapse, including numerous vaginal births and obesity. Both doctors also agree that Claimant actually suffered from cystocele, rectocele, and uterine prolapse. Furthermore, both doctors seem to agree that lifting a swimming pool could, at a minimum, aggravate a cystocele, rectocele, and

uterine prolapse. The disagreement comes into play only as to whether the lifting of the pool actually caused or aggravated Claimant's cystocele, rectocele, and uterine prolapse, or, if lifting the pool did in some way aggravate Claimant's condition, whether it was a *major* contributing cause.

In determining whether Claimant met her burden to prove that her work related activities actually caused or aggravated Claimant's cystocele, rectocele, and uterine prolapse, this Court must review a determination of fact. *See* Gerlach v. State, 2008 SD 25, ¶ 7, 747 N.W.2d 662, 664 (stating: "Whether [Claimant's] employment was a major contributing cause of his condition is necessarily a question of fact."). Nonetheless, since all of the medical testimony on this issue is documentary in the form of depositions, this Court reviews the issue without deference to the Department's findings.

Claimant relies on the deposition testimony of Dr. Scott Berry for her evidence of causation. A review of Dr. Berry's deposition testimony is determinative in this Court's decision. This is primarily because a close review of Dr. Berry's testimony only goes to substantiate Dr. Marcus's opinion that it is not possible, with reasonable medical certainty, to show that the lifting event was a major contributing cause of Claimant's injuries. This starts with Dr. Berry's direct examination. After a fairly lengthy discussion as to preexisting conditions and that "often, there is a precipitating event" which causes a cystocele or rectocele to occur, *see* Transcr. Depo. Scott Berry, M.D. 10:1-12:23, the deposition went on to state:

> **Q.** And again, the major contributing cause to what led into your type of treatment, though, was the lifting incident in May?
> **A.** As she relates it to me, yes.

Transcr. Depo. Berry 12:24-13:2. At other times, Dr. Berry says that the lifting event "seems to be" the precipitating event. Transcr. Depo. Berry 12:7-13:8. Although the Court notes that Dr. Berry does seem to indicate that his opinion is that the lifting event in May was the precipitating event, the testimony by itself is equivocal throughout.

This equivocation is exposed further by the cross examination of Dr. Berry, where the deposition stated:

> **Q.** Okay. Continuing on, you talk about – again, I'm reading between the lines here, Doctor. And I have to ask you. You say: I have told her I do feel her story sounds as if the symptoms did occur during that time, but in general, uterine cystocele and rectocele-type symptoms can be aggravated by lifting; they are generally not totally caused by this, however.

A. And just, that's what I put in my records. That's just what I've stated here. That I believe that the conditions that lead to these problems are lifelong events. They can be aggravated by certain things such as giving birth, giving birth to large babies, and connective tissue disorders, which we haven't mentioned and I don't believe Becky has, but tissue, connective tissue disorders. And the, that single event can, can, in can be set up so that a single event can make it come to attention. But it probably – had she lifted this hot tub when she was 20 years old and not had any children, would she have had this problem? Probably not. So it, you know, it was, it was set up by the, by lifelong things, in most cases. And that is kind of what you're getting at, and I would agree with this, that people don't just have no problems, no conditions that would lead to prolapse, and then lift something and bloop, there it is. I would say that's not, in my experience, the case. It tends to be multifactorial. But one major fact can certainly bring the problem, make the problem worse and bring it to a patient's attention when it becomes that.
Q. And you're talking in that answer really about possibilities, what can possibility happen, true?
A. I guess so, yes.

Transcr. Depo. Berry 33:8-34:13. Additionally, Dr. Berry goes on to relay:

Q. Now, is it fair to say that the opinions as to causation that you've given today are based entirely on the history that was related to you by Becky Cantwell of what happened, when it happened and how it happened?
A. That's correct.
Q. She does say, or your note says on the fifth line: This has been bothering her ever since 3/15 when this happened. Do you see that?
A. Yes. I believe that's the date that –
Q. She told you?
A. Yeah. I obviously have no personal understanding of when she was working, where she was working --
Q. Right.
A. – what date these things happened.
Q. To follow up on that, you have no direct, personal knowledge of exactly the biomechanics of what happened or may have happened around May 8th or March 15th do you?
A. No.
Q. You don't have any knowledge of what this vinyl swimming pool or whatever it is looks like: The size of it, the weight of it?
A. No. No, I don't.

> **Q.** You don't know the biomechanics of her alleged lifting of that piece of equipment?
> **A.** That would be correct.
> **Q.** And indeed, you didn't, if she uses now the date of May 8th as the date of injury, you didn't see her for almost a month later, June 2nd, for the first time? . . .
> **A.** Oh, I'm sorry. March 15th is what's typed in here. I saw her June 2nd. So that would be two-and-a-half months. . . .

Transcr. Depo. Berry 26:13-27:22. The cross examination of Dr. Berry reveals that based on the fact that he did not examine Claimant for nine years, he didn't know whether the problem was gradually coming to fruition before the lifting event. Dr. Berry stated:

> **Q.** Okay. You've already told me that you do not know the specific, biomechanical details of this event with her at work, true?
> **A.** Short of understanding that if, that if, that lifting would be a Valsalva inducing episode, but yes, as far as how much she lifted, how long she lifted, what weight she lifted, I am not aware of that.
> **Q.** All right, but we do know that there's a constellation of contributory events over the course of her life that led to and contributed to the prolapsed uterus, true?
> **A.** I would say there can be, yes.
> **Q.** Weren't there in her case?
> **A.** Other than Childbirth, I'm not aware of any others. If I --
> **Q.** Well, isn't that enough, having five vaginal births?
> **A.** It can be, yes.
> **Q.** Okay.
> **A.** But again, I did not examine her for nine years, so I don't know if this was a, a problem that was gradual.

Transcr. Depo. Berry 43:9-44:4

In all, Dr. Berry's reasoning fits into the analysis that Dr. Marcus gave. Dr. Marcus gave testimony to the effect that it would not be possible with a reasonable degree of medical probability to know whether Claimant's lifting incident was a major contributing cause of her cystocele, rectocele, and uterine prolapse, *see* Transcr. Depo. Phillip Marcus, M.D. 14:8-14:15, although he admits that a lifting incident could possibly exacerbate preexisting conditions. Transcr. Depo. Phillip Marcus, M.D. 40:4-40:7. Both doctors conclude it is possible that Claimant's condition could have been exacerbated by a "triggering mechanism" such as a lifting event. Nonetheless, even Dr. Berry states that it is only a possibility that Claimant's work related activities are what exacerbated Claimant's condition. As Dr. Berry stated, people lift things all the time, which given Claimant's condition,

could have caused her condition. *See* Transcr. Depo. Berry 12:13-12:23. Claimant lifting the pool *may* have been a precipitating event, but no doctor is able to testify that there is any medical evidence that it actually *was* the precipitating event.

The totality of the testimony in this case does not establish causation to the level of proof required for Claimant to prevail on her claim. "Our law requires a claimant to establish that his injury arose out of his employment by showing a causal connection between his employment and the injury sustained." Horn v. Dakota Pork, 2006 SD 5, ¶ 14, 709 N.W.2d 38, 41. "A [workers'] compensation award cannot be based on possibilities or probabilities, but must be based on sufficient evidence that the claimant incurred a disability arising out of and in the course of his employment." Day v. John Morrell & Co., 490 N.W.2d 720, 724 (S.D. 1992) (citing Wold v. Meilman Food Industries, 269 N.W.2d 112, 116 (S.D.1978); Rose v. John Deere Ottumwa Works, 76 N.W.2d 756 (Iowa 1956)). Medical testimony to the effect that it is possible that a given injury caused a subsequent disability is insufficient, standing alone, to establish the causal relation under worker's compensation statutes. *Id.* (citing *Wold*, 269 N.W.2d at 116). Since Claimant has not met her burden of proof on causation, all benefits resulting from her cystocele, rectocele, and uterine prolapse are reversed, including both temporary total benefits and permanent partial benefits. [2]

II. EVEN IF CLAIMANT WOULD PREVAIL ON THE CAUSATION ISSUE, CLAIMANT DOES NOT SUFFER FROM A PERMANENT DISFIGUREMENT OR A PERMANENT DISABILITY, AND WOULD THUS NOT RECEIVE PERMANENT PARTIAL DISABILITY BENIFITS.[3]

Both parties dispute the meaning of the 1994 amendments to SDCL 62-4-6 in determining permanent partial disability benefits. SDCL 62-4-6, as amended, states, in pertinent part:

> For injuries in the following schedule, an employee shall receive . . . compensation for the following further periods . . . for the specific medical impairment[:]
>
> (24) For permanent disfigurement, or permanent disability resulting from injury to any part of the body not hereinbefore listed, compensation for that portion of three hundred twelve weeks which is represented by the percentage that such permanent partial disability or permanent disfigurement bears to the body as a whole.

---

[2] Since Claimant has failed to meet her burden of proof as to causation, whether Claimant's lifting incident would be a *major* contributing cause need not be addressed.

[3] Since Claimant has not met her burden of proof on causation, discussion in Part II only supplements the denial of benefits under Part I.

Additionally, SDCL 62-4-1.2 defines impairment as:

> For the purposes of this chapter, impairment shall be determined by a medical impairment rating, expressed as a percentage to the affected body part, using the Guides to the Evaluation of Permanent Impairment established by the American Medical Association, fourth edition, June 1993.

Employer and Insurer contend that SDCL 62-4-6 focuses solely on loss of income-earning ability. Employer and Insurer cite the general rule that the overall purpose of our workers' compensation act is designed to compensate an employee or his family for the loss of the employee's income-earning ability. *See* McDowell v. Citibank, 2007 SD 52, ¶ 12, 734 N.W.2d 1, 5. Employer and Insurer also cite a significant amount of case law which stands for the proposition that, when determining loss of use under SDCL 62-4-6, the fact finder must look to the loss of an employee's earning potential, which looks beyond simple medical impairment. *See* Caldwell v. John Morrell & Co., 489 N.W.2d 353 (S.D. 1992) (stating "disability rating due to a "loss of use" . . . under the provisions of SDCL 62-4-6, only be considered in the context of what effect it would have on the employee's income-earning capability"); *see also* Wagaman v. Sioux Falls Const., 1998 SD 27, ¶ 41, 576 N.W.2d 237, 244 (stating: "Factors such as medical impairment rating, testimony of vocational experts, and other testimony must be considered to determine loss of use. . . . [A] disability rating due to a loss of use of use a body member . . . can only be considered in the context of what effect it would have on the employee's income earning capability"), Tischler v. United Parcel Service, 1996 SD 98, ¶ 50, 552 N.W.2d 597, 605 (stating: "We have held that a disability rating due to a 'loss of use' of a body member can . . . only be considered in the context of what effect it would have on the employee's income earning capability"); Cozine v. Midwest Coast Transport, Inc., 454 N.W.2d 548, 551-52 (S.D. 1990) (stating: "The clear language of this statute directs that compensation shall be paid for loss of use. . . . This determination requires more than a mere adoption of a medical evaluation of anatomical impairment. A medical impairment rating will not always measure loss of use. . . . Although the medical impairment rating given by a doctor is an important factor, the extent of loss of use does not necessarily equal the extent of medical impairment. *Id.* Indeed, the American Medical Association, Guide to the Evaluation of Permanent Impairment, (2d ed. 1984), explains the limited nature of an impairment rating: 'The physician who makes a determination about impairment must keep in mind that a permanent impairment rating is not the same as a disability rating. Permanent medical impairment is related directly to the health status of the individual, whereas disability can be determined only within the context of the personal, social, or occupational demands, or statutory or regulatory requirements that the individual is unable to meet as a result of the impairment.' A medical impairment rating simply is not intended to measure loss

of use."). The Court agrees that prior to the 1994 amendments to SDCL 62-4-6, Employer/Insurer would be articulating the proper state of the law.

Claimant argues that the current language of SDCL 62-4-6 focuses solely on medical impairment. Claimant argues that the Supreme Court has recognized this change in recent opinions. For example, Claimant calls attention to *Belhassen v. John Morrell & Co.*, where the Court addressed the change in law, by stating:

> The above mentioned SDCL 62-1-1(8) was substantially amended in 1994. The commission note to the current SDCL 62-1-1 notes that since the contents of the 62-1-1(8) were also adopted under 62-1-1.2, "the Legislative intent was to repeal subdivision (8) of this section because it would have been redundant." Under SDCL 62-1-1.2, which was also adopted in 1994, "impairment shall be determined by a medical impairment rating, expressed as a percentage to the affected body part, using the Guides to the Evaluation of Permanent Impairment established by the American Medical Association, fourth edition, June 1993."

2000 SD 82, ¶ 22 n.5, 613 N.W.2d 531, 538 n.5.[4] Claimant also relies on *Cantalope v. Veterans of Foreign Wars Club of Eureka*, 2004 SD 4, 674 N.W.2d 329. In *Cantalope*, the Court addressed the ability of a physician to deviate from the AMA guidelines in making an impairment rating. The Court held, in a situation where the *AMA Guides* did not contain ratings on Claimant's specific injury but had ratings for similar injuries, that since the *AMA Guides* expressly allow for professional discretion in reaching a determination, as long as the discretion is supported by competent medical evidence and is consistent with the general purpose of the *AMA Guides*, the discretion satisfies the statutory requirements of SDCL 62-1-1.2. 2004 SD 4, ¶ 17, 674 N.W.2d at 337. Although the Court did not address whether the former "loss of use" analysis was statutorily overruled, it is important to note the Court did recognize the new requirement of SDCL 62-1-1.2, stating:

> [Claimant] claimed permanent partial disability under SDCL 62-4-6(24) which allows compensation for permanent partial disability. ***In order to compute the statutory compensation allowed, a claimant must be evaluated and given an impairment rating.*** Such rating shall be "expressed as a percentage to the affected body part, using the Guides to the Evaluation of Permanent Impairment established by the American Medical Association, fourth edition, June 1993" (Guides). SDCL 62-1-1.2.

---

[4] The Supreme Court did not address the effect of the change on that case because the claim arose in 1993.

Cantalope, 2004 SD 4, ¶ 14, 674 N.W.2d at 336 (emphasis added). Additionally, the *Cantalope* Court did not perform any loss of income-earning capability analysis. *See generally id.* at ¶¶ 14-17, 674 N.W.2d 336-337.

The South Dakota Supreme Court has consistently recognized that:

> "[P]roceedings under the Workers' Compensation Law ... are purely statutory, and the rights of the parties and the manner of procedure under the law must be determined by its provisions." Furthermore, "when the language of a statute is clear, certain and unambiguous, there is no occasion for construction, and the court's only function is to declare the meaning of the statute as clearly expressed in the statute."

Sopko v. C & R Transfer Company, Inc. 2003 SD 69, ¶10, 665 N.W.2d 94, 97 (internal citations omitted).

It is important to recognize that decisions interpreting SDCL 62-4-6 have consistently relied heavily on the statutory language in SDCL 62-4-6 prior to the 1994 amendments, which stated that compensation was based upon a claimant's "loss of use." *See Cozine*, 454 N.W.2d at 551-52 (stating: "The clear language of this statute directs that compensation shall be paid for loss of use."). SDCL 62-4-6 was significantly altered by the Legislature in 1994. Those amendments struck every reference to "loss of use," opting for the statutorily defined "medical impairment" language. For example, the prefatory clause in SDCL 62-4-6 was amended as:

> For injuries in the following schedule, an employee shall receive in addition to compensation provided by §§ 62-4-1, 62-4-3, and 62-4-5.1, compensation for the following further periods, subject to the limitations as to rate and amounts fixed in § 62-4-3, for the specific ~~loss~~ <u>medical impairment</u> herein mentioned, but ~~shall~~ <u>may</u> not receive any compensation under any other provisions of this title:

SL 1994, ch 396, § 6.

Another telling example is 62-4-6(22) was amended as:

> In all cases in the above schedule under this section, ~~where~~ <u>if</u> the ~~loss of use~~ <u>medical impairment</u> is partial and permanent, the compensation shall bear such relation to the maximum amount for complete and permanent loss ~~of use~~ as defined in this section as the partial ~~loss of use~~ <u>medical impairment</u> bears to the complete loss ~~of use~~.

SL 1994, ch 396, § 6.

The effect of these changes is apparent. Looking to the language of the statute, it plainly reads that compensation is now determined solely based on a medical impairment rating, as set forth by the prefatory clause in SDCL 62-4-6. Prior to 1994, this was based on "loss of use." As such, this Court agrees with Claimant to the extent that the 1994 amendment did have some affect. Certainly after the amendment to the prefatory language, as well as the overall textual change of the statute, the statute plainly reads that a medical impairment rating, without addressing income-earning capability, is appropriate to determine the amount of compensation due under SDCL 62-4-6.[5]

Nonetheless, in interpreting the statute, this Court must look to the totality of SDCL 62-4-6(24), as amended, which states: "For permanent disfigurement, or permanent disability resulting from injury to any part of the body not hereinbefore listed, compensation for that portion of three hundred twelve weeks which is represented by the percentage that such permanent partial disability or permanent disfigurement bears to the body as a whole." As such, although the Legislature has amended SDCL 62-4-6(24) to require a medical impairment rating to determine the amount of compensation, the statute, even as amended, includes a threshold requirement of determining whether an injury resulted in either "a permanent disfigurement" or a "permanent disability resulting from injury to any part of the body not hereinbefore listed."[6]

The Department seemed to recognize this statutory requirement by reasoning in its decision that:

> The plain language of SDCL 62-4-6 allows permanent partial benefits for "disfigurement." SDCL 62-4-6(24) "provides compensation 'for permanent disfigurement, or permanent disability resulting from injury to any part of the body not hereinbefore listed.' Disfigurement and disability are listed in the disjunctive. Recovery for the disfigurement does not depend on whether it creates a disability." Lewis v. S.D. Dept. of Transp., 2003 SD 82, ¶ 34. Dr. Luther is certified in the evaluation of disability and impairment ratings. Dr. Luther's opinion is accepted as persuasive. Claimant has met her burden to show a permanent impairment of 15% of the whole person."

Department's Memorandum Decision, at 7.

---

[5] As such, it was proper for the Department to look solely to medical impairment to determine the amount of compensation, without considering work restrictions or work limitations due to surgery.

[6] Classification of injury prior to determining compensation is the nature of SDCL 62-4-6, which in essence, sets forth a table for injuries and then the amount of recovery. For example, SDCL 62-4-6(1) provides that if a worker loses a thumb, his or her compensation would be thirty weeks of earnings.

Additionally, the Department made the following Findings of Fact in regard to the existence of a disfigurement or disability:

24. Dr. Luther has certification in Evaluation of Disability and Impairment Ratings (CEDIR) through the American Academy of Disability Evaluating Physicians. He opined that Claimant qualifies for a 15% permanent impairment under a "blend" of classes one and two under Chapter 11.6a of the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition.
25. During his deposition testimony, Dr. Luther conceded repeatedly that there is no disease or deformity in Claimant's vulva or vagina.
26. Sexual intercourse is possible for Claimant.
27. Claimant does not require continuous treatment for symptoms and signs of disease or deformity in Claimant's vulva or vaginal [sic].
28. Dr. Luther conceded that Claimant's vagina would be adequate for childbirth if she had the ability to have children.
29. In assessing Claimant with a 15% permanent impairment, Dr. Luther used a "clinical judgment" based upon his expertise as an impairment expert.
30. Dr. Luther is certified in the evaluation of disability and impairment ratings. Dr. Luther used a "clinical judgment" based upon his expertise as an impairment expert.

In reviewing the decision, the Department made no specific finding stating that a permanent disability or permanent disfigurement had occurred.[7] Although the Memorandum Decision of the Department seems to indicate that the Department believed a disfigurement has occurred, it did not make such a finding.

In terms of guidance, this Court refers to the South Dakota Supreme Court's decision in *Lewis v. SD Dept. of Transportation*. 2003 SD 82, 667 N.W.2d 283. The *Lewis* decision is the only time the South Dakota Supreme Court has addressed the term disfigurement in the SDCL 62-4-6(24) context. The Court's rationale is extremely informative on the issue. The Court reasoned:

> ***To the extent that the administrator relied on the simple fact that veneers are cosmetic, her reasoning ignores SDCL 62-4-6(24) which provides compensation for "permanent disfigurement." Likewise, to the extent that the administrator's***

[7] Claimant contends that review of whether a Claimant suffers from a disfigurement is improper because the issue was not raised before the Department. While it is true that "[i]ssues not addressed or ruled upon by the [Department] will not be addressed by this court for the first time on appeal," Harter v. Plains Insurance Co., Inc., 1998 SD 59, ¶ 27 n.5, 579 N.W.2d 625, 632 n.5, it is quite evident that although the issue may not have been addressed by the parties, it was clearly addressed and ruled on by the Department in its Memorandum Decision. As such, the issue is at issue in this appeal.

> ***opinion may have depended on an assessment that the veneers in question were not visible, that conclusion is undercut by evidence to the contrary.*** While the administrator testified that Dr. Loftus had answered "no" when asked whether the veneers in question would be ***visible*** when Lewis smiled, Dr. Loftus could not remember having told her that the damage would not be ***noticeable***. Additionally, at his deposition he testified that he had ***noticed*** the chips "right away" and that "[t]hey are his ***front four teeth***, so I would imagine they would be ***visible to other people***." ***Presumably, Dr. Loftus would not have recommended replacement were the chips not visible.*** Dr. Loftus' opinion that the veneers should be replaced was also supported by his concern that food and bacteria could enter the chipped areas, thus promoting tooth decay and cavities. This is further support for the reasonableness and medical necessity of replacing the veneers. Finally, the administrator did not dispute that Dr. Loftus had recommended that all four veneers be replaced. Given the medical expert's determination, Employer had the burden to show that the recommended treatment was not "necessary, suitable or proper." *See* Hanson v. Penrod Construction Co., 425 N.W.2d 396, 399 (S.D.1988).
>
> Similarly, Department's reasoning for denying compensation for the cost of scar removal was not only internally inconsistent, but it also ***disregarded the statutory coverage for permanent disfigurement and ignored the non-cosmetic aspect of the scars. Having earlier indicated that veneer replacement could be compensable if visible, the administrator, relying solely on the director's e-mail response, determined that removal of a scar was only compensable if it adversely affected his ability to perform his work. By adding a new condition to recovery for injuries of a "cosmetic" nature, this denial of compensation for scar removal ignores the plain language of SDCL 62-4-6(24). That subsection provides compensation "for permanent disfigurement, or permanent disability resulting from injury to any part of the body not hereinbefore listed." Disfigurement and disability are listed in the disjunctive. Recovery for the disfigurement does not depend on whether it creates a disability. The administrator admitted her awareness of this statute but she chose to disregard it.***

Id. at ¶¶ 33-34, 667 N.W.2d at 291-92 (emphasis added). This reasoning is extremely important on three levels. First, as recognized by the Department, it states that the terms disability and disfigurement are in the disjunctive, meaning a Claimant is only required to demonstrate one of the two to recover. *Id.* Second, the

language clearly recognizes the cosmetic nature of a disfigurement. *Id.* Third, the language implies that although a disfigurement does not require an effect on a claimant's income earning potential, a disability does. *Id.*

The view that a disfigurement must affect the cosmetic nature of a claimant is reflected by the plain meaning of the word. Disfigurement is defined by Merriam-Webster Dictionary as: "to impair (as in beauty) by deep and persistent injuries <a face disfigured by smallpox>." *Merriam Webster Online Dictionary*, www.merriam-webster.com (last accessed on October 28, 2008). This definition shows the cosmetic nature that is required for a disfigurement by stating "as in beauty." Furthermore, the view that a disfigurement must be cosmetic in nature is reflected by the vast majority of case law throughout the nation. *See, e.g.,* Thomas v. Rhode Island Insurers' Insolvency Fund, 814 A.2d 335, 338 (R.I. 2003) (reasoning that a "'disfigurement,' for purposes of determining specific workers' compensation benefits, is that which impairs or injures the beauty, symmetry or appearance of a person or thing; that which renders unsightly, mis-shapen or imperfect or deforms in some manner."); Purex Corporation v. Workmen's Compensation Appeal Board (Ross), 445 A.2d 267, 269 (Pa. 1982), overruled in part on other grounds by American Chain & Cable v. Workmen's Compensation Appeal Board (Weaver), 454 A.2d 211 (Pa. 1982) (reasoning that a claimant seeking compensation for disfigurement must prove that his disfigurement is serious and permanent, unsightly, and not usually incident to his employment); Superior Mining Co. v. Industrial Comm'n, 141 N.E. 165, 166 (Ill. 1923) (reasoning that "'disfigurement,' for purposes of determining specific workers' compensation benefits, is that which impairs or injures the beauty, symmetry or appearance of a person or thing; that which renders unsightly, mis-shapen or imperfect or deforms in some manner.").

In the case at hand, the Department's findings of fact specifically state that there is no deformity in Claimant's vulva or vagina. Dept. Finding of Fact at ¶ 25. Even if there was, the deformity would certainly not be visible. As such, as a matter of law, Claimant cannot be suffering from a disfigurement based on her cystocele, rectocele, and uterine prolapse.

Nevertheless, Claimant could recover if she suffered from a disability. The Department made no finding as to whether there was a disability, and instead solely relied on the injury being a disfigurement. It is unclear whether, in doing so, the Department was rejecting the idea that it was a disability.

To determine whether Claimant suffers from a disability, it is important to understand exactly what a "disability" is. It has been repeatedly recognized by the South Dakota Supreme Court, and echoed by the American Medical Association Guide to the Evaluation of Permanent Impairment, that a medical impairment is not synonymous with a disability, as reasoned by the Court in *Marnette v. Morgan*, where the Court stated:

In *Cozine*, we further quoted with approval from the American Medical Association Guide to the Evaluation of Permanent Impairment, (2nd Ed.1984), wherein it is stated:

> Permanent medical impairment is related directly to the health status of the individual, whereas disability can be determined only within the context of the personal, social, or occupational demands, or statutory or regulatory requirements that the individual is unable to meet as a result of the impairment.

485 N.W.2d 595,598 (S.D. 1992). As such, a "permanent medical impairment does not automatically support the presumption that there is a disability as well." *Id.*

As a matter of law, Claimant did not suffer a disability in this case. The Department specifically found that "Claimant made a full recovery after the surgery and has no work restrictions or work limitations due to the surgery." In a workers' compensation context, a disability "is based on the worker's *occupational* situation." *McDowell*, 2007 SD 52, ¶ 13, 734 N.W.2d at 5 (emphasis in original). Since Claimant's impairment was found to have no permanent adverse occupational effects, the Claimant does not suffer from a permanent disability and cannot recover under SDCL 62-4-6.[8]

III. IT WAS NOT CLEARLY ERRONEOUS FOR THE DEPARTMENT TO DENY BENEFITS TO CLAIMANT FOR HER LOWER BACK CONDITION.

Claimant alleges certain lower back pain resulted from the injury. Claimant relied on the deposition testimony of Dr. Anthony Skjefte, her treating chiropractor, and the live testimony of Dr. Thomas Ivey, a chiropractor certified in impairment

---

[8] It may seem paradoxical for the statutory scheme to require the sole use of a medical impairment rating to determine compensation under SDCL 62-4-6, but then require broader scrutiny to determine if a disability exists. Nonetheless the Legislature may have had various rationales for why it changed the way to calculate compensation, such as to reduce the cost of presenting added evidence at hearings, to prevent excess awards, or to simply make the process more "objective." None of those would affect the fact that a disability is different from a simple analysis of whether there is medical impairment. There is no evidence that the Legislature intended to change the long held definition of disability. The legislature could have amended SDCL 62-4-6(24) by striking the word "disability" and adding the term "medical impairment." It did not do so. "This court assumes that statutes mean what they say and that legislators have said what they meant." Mid-Century Ins. Co. v. Lyon, 1997 SD 50, ¶ 9, 562 N.W.2d 888, 891 (quoting In re Famous Brands, Inc., 347 N.W.2d 882, 885 (S.D.1984)).

ratings, to establish the lower back injury. Additionally, the Court heard live testimony from Claimant regarding her subjective feelings of back pain.[9]

In Dr. Skjefte's deposition testimony, he reported that his opinion of causation was based primarily on Claimant's subjective reports of pain, but stated that it was "similar" to the pain she reported prior to the incident. During the hearing, Dr. Ivey stated that there was a thirteen-percent whole person impairment, but gave testimony that conflicted on whether it related to her both pre-existing and current back conditions. For example, Dr. Ivey admitted that in regard to whether there was any increased impairment caused by the lifting incident taking place 8 May 2003, "there is really no hard and fast objective scientific basis for that three percent [impairment rating]." The Department found that Claimant did not meet her standard of proof as to causation of her lower back injuries, and disallowed any compensation for these claims.

As recognized by the Department, "[C]laimant has the burden of proving the facts necessary to sustain an award of compensation. The claimant must prove the essential facts by a preponderance of the evidence." *Orth*, 2006 SD 99, ¶ 35, 724 N.W.2d at 593 (internal citations omitted). In this case, there is no dispute that Claimant had an impaired back prior to 8 May 2003. As such, the Claimant's subjective statements regarding her back pain are the most important factor, since, as recognized by Claimant's experts, Claimant's statements regarding her increased pain are the basis for her experts' opinions, as well as an important factor for the ALJ to consider. After hearing Claimant's testimony, as well as considering the testimony of both Dr. Ivey and Dr. Skjefte, the Department found that no impairment was caused in excess of what she already experienced prior to the event.

This decision is not clearly erroneous. Claimant's experts gave conflicting testimony as to the effect of her prior condition. Dr. Ivey specifically stated that he had no scientific basis for his determinations. A medical expert's finding of causation cannot be based upon mere possibility or speculation. *Orth*, 2006 SD 99, ¶ 34, 724 N.W.2d at 593 (citing Deuschle v. Bak Const. Co., 443 N.W.2d 5, 6 (S.D.1989); Rawls v. Coleman-Frizzell, Inc., 2002 SD 130, ¶ 21, 653 N.W.2d 247, 252-53). Moreover, the Department had access to live testimony that this Court does not have access to.

Claimant contends that the Department made an error of law involving the effect of a pre-existing condition. Such a proposition is incorrect. The Department properly applied and understood that a pre-existing condition does not rule out recovery. Instead, the Department stated that Claimant has the burden of proving that the "employment aggravated, accelerated or combined with the condition or

---

[9] Since the Department made its decision, in part, on the basis of live medical testimony, this Court will reverse the decision only if the decision was clearly erroneous.

infirmity to produce a disability for which compensation is sought." *Orth*, 2006 SD 99, ¶ 35, 724 N.W.2d at 593 (internal citations omitted). In this case, based on the evidence presented, the Department found that Claimant did not meet that burden. This Court agrees.

IV. CLAIMANT IS NOT ENTITLED TO AN AWARD OF COSTS IN CONNECTION WITH THE DEPARTMENT'S HEARING OR THIS APPEAL.

Claimant argues that the Department erred in not awarding her costs. As far as whether the Department erred in not awarding Claimant's costs associated with the Department's hearing, this Court finds the situation similar to what the Supreme Court described in *Tischler v. United Parcel Service*. 1996 SD 98, ¶ 67, 552 N.W.2d 597, 608. In *Tischler*, the Court reasoned:

> In this case, the Department denied costs because all parties disputed issues. Tischler was attempting to gain benefits and UPS and the City were attempting to avoid paying chiropractic expenses which the Department ultimately held unnecessary. We see no abuse of discretion in this ruling and we affirm the circuit court on costs.

Id.

In this case, the Department found in favor of the Claimant on some issues and for the Employer/Insurer on some issues. The Department had disputed issues to resolve, and it was not an abuse of discretion to deny costs.

CONCLUSION

Accordingly, the Department's decision is affirmed as to the denial of permanent partial disability benefits for Claimant's lower back condition, and the denial of awarding costs to Claimant. The Department's decision is reversed as to awarding any compensation resulting from Claimant's cystocele, rectocele, and uterine prolapse.

Counsel for Employer/Insurer should prepare appropriate findings, conclusions and an Order. Counsel for Claimant may respond according to the rules of civil procedure.

Sincerely,

Lori S. Wilbur